United States Court of Appeals

for the Second Circuit

APPENDIX

75-2100

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA
ex rel. LEON WASHINGTON,

Petitioner-Appellant,

- against -

LEON V. VINCENT, Warden,
Greenhaven State Prison,

Respondent.

----------X

B

JOINT APPENDIX

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OPINION OF THE APPELLATE
DIVISION, SECOND DEPARTMENT

S H A P I R O , J. In this case the Criminal Term, after a hearing, sustained the defendant's application for a writ of error coram nobis and set aside the judgment convicting him of the crime of murder in the first degree. On direct appeal the judgment had been affirmed by this court and by the Court of Appeals (People v. Washington, 32 A D 2d 613, affd. 27 N Y 2d 649).

The basis for the court's determination setting aside the judgment of conviction was that a witness, Martin Anderson, perjured himself on the trial when he denied that the prosecutor had made him any promise in connection with his indictment for the possession of the gun used in the instant killing. Upon cross-examination at the trial he testified as follows:

> "Q. Has any arrangement been made between you and the district attorney's office with respect to that case concerning your testimony here? A. No, sir.
>
> Q. Do you expect to be rewarded in some way for your testimony here? A. No, sir.
>
> Q. Has anyone given you an indication that by your testimony here you will be helping yourself in that case? A. No, sir.
>
> * * * *
>
> The Court: * * * Did you make any

deals with the district attorney that if you testified against this man you would get off on the other case?

The Witness: No, sir.

By Mr. Wall [attorney for defendant]:

Q. Or you would receive some sort of favorable consideration on the other case? A. No, sir.

Q. Do you expect to receive any favorable treatment from the district attorney for your testimony in this trial, implicating this defendant? A. No, sir.

Q. Either on the June indictment or the other indictment? A. No, sir.

Q. Have you had any arrangements with anybody so that you will receive the benefit of implicating this defendant? A. No, sir.

The Court: All right. That's neither nothing was said before you made the statement that you talked about, when you talked to the district attorney and he asked you about a stenographer there, was anything said before that, or was anything said after, at either time?

The Witness: No, sir.

By Mr. Wall:

Q. At any time, sir, since February 4th of 1966, has anyone offered you anything in return for your favorable testimony to implicate him? A. No, sir."

After the defendant was convicted the People moved to dismiss the indictment charging Anderson with possession of the gun on the basis of his assistance in testifying in this defendant's case. In moving to dismiss that indictment the Assistant District Attorney (who was also the same one who had prosecuted this defendant) told the court that while no "direct" or "specific" promise had been made to Anderson he did tell him he would do what he could to help him in return for his testimony. His "dismissal statement", which was filed in connection with the dismissal of the Anderson indictment, in pertinent part reads:

> "Prior to the time the instant defendant testified during the several conferences I had with him, I told him that I would try and help him in the instant case."

I agree with the statement of the District Attorney, in his brief, that "there is little in the way of praise which can be said for the Assistant District Attorney who vigorously prosecuted the defendant, but sat passively by and did not correct the erroneous testimony the witness proffered." Therefore, if the record contained nothing else it is clear that the prosecutor's conduct would necessarily require a vacatur of the judgment of conviction (People v. Savvides,

1 N Y 2d 554; People v. Mangi, 10 N Y 2d 86; People v. Ellington, 19 A D 2d 654).

The commendable rationale of those and like cases is that the People may notsecure -- and hold -- a conviction which has been obtained by testimony which they knew, and the defendant did not know, to be perjured. The record in this case, however, makes it clear beyond peradventure that when Anderson gave his "no pre-arrangement" testimony both the defendant and his counsel knew it to be false and deliberately refrained from disclosing that fact. In his moving papers on this coram nobis application the defendant stated that shortly before his trial commenced he had a conversation with the witness, Martin Anderson, who had been indicted for possession of the murder weapon, and that Anderson told him that the District Attorney had promised him, Anderson, that "he would see what he could do to help him on the gun case under indictment #1821/66, if he would testify against" the defendant. Although the defendant says he was ignorant of the import of that statement by Anderson and therefore never informed his trial counsel that it had been made, his statement in that regard is belied by his counsel who on the hearing of this coram nobis application admitted that the defendant had told him of Anderson's statement.

During his testimony at the trial, in his own behalf, the following transpired:

> "The Court: How often did you see Anderson after that?
> The Witness: I didn't see him too regular.
> The Court: How often?
> The Witness: I couldn't say, your Honor.
> The Court: Did you ever fight with him after that?
> The Witness: No, sir.
> The Court: Any reason you could think of why he should try to accuse you of murder?
> The Witness: Well, I know he's not loved me.
> The Court: What?
> The Witness: He's not in love with me.
> The Court: I didn't ask you that. Is there any reason why he would falsely accuse you of murder?
> The Witness: He could be trying to protect someone. I don't know.
> The Court: But why you?
> The Witness: I don't know.
> The Court: All right" (emphasis supplied).

It thus appears that when the defendant testified that he knew of no reason why Anderson would falsely accuse him of murder he and his counsel both knew that Anderson had received a promise of help from the prosecution if he would testify against the defendant. Having thus had an opportunity to reveal his information as to the deal Anderson had made with the prosecution and having failed to avail himself of

it, is he now -- having lost his case -- in a position to upset the verdict rendered against him? I think not.

A case close in point of fact to this one is Green v. United States (256 F. 2d 483, cert. den. 358 U.S. 854). There the defendant sought postconviction relief, claiming that prior to his trial he and his codefendant, Jacobanis, overheard a conversation in the neighboring cell. The conversation was between an Assistant United States Attorney and one Roccaforte, an additional codefendant in the case. The conversation allegedly indicated that the government prosecutor had knowingly persuaded Roccaforte, in exchange for a light sentence and freedom from deportation problems, to testify against the defendant.

In denying the relief sought, the United States Court of Appeals stated (at p. 484):

> "It is clear that this asserted information, of which Green was admittedly aware before he went to trial, cannot now be used as a basis for attacking the judgment of conviction."

In that case Green argued that disclosure of the arrangement of which he was aware would have required him to take the stand as a witness on his own behalf and thus would have required him to waive his privilege against self incrimination. Despite that contention the court held that he

could not gamble on a favorable outcome and, when that did not eventuate, seek to supply the withheld evidence on an application to set aside the conviction. Here, that problem does not exist, for the defendant did take the stand and did himself commit perjury when he denied that he had known of the existence of any reason why Anderson should accuse him of murder.

In Davis v. United States (316 F. Supp. 913, 915) the court stated what I believe should be the applicable rule to be adopted in this State when it said:

> "This Court finds that the use of perjured testimony which is known by the defense to be perjured at the time of trial is not a basis for setting aside a verdict. Evans v. United States, 408 F. 2d 396 (C.A.7, 1969) following Decker v. United States, 378 F. 2d 245 (C.A.6, 1967)."

In People v. Altruda (N.Y.L.J., Dec. 2, 1964, p. 19, col. 5) I had occasion to consider the question here posed and I there said (col. 7) that:

> "since he [defendant] was thus possessed of evidence which could have been introduced at the trial he may not now use Stromberg's false innuendoes as a basis for coram nobis relief (People v. Russo, 284 App. Div. 763, 766; People v. Moore, 284 App. Div. 925)."

In that case, in analyzing the same cases cited by the defendant here, and set forth above, I pointed out that "in each of the cases the premise for reversal, or the ordering of a hearing, was the perpetration of a fraud upon the defendant because in each case he was ignorant of the falsity of the testimony given by the witness" (col. 7) but that in the case before me the defendant "having chosen not to pursue the matter further than he did, * * * the choice was a voluntary one and he may not in the guise of coram nobis have a second bite of the apple" (cols. 7-8).

In our case no fraud or deception was perpetrated upon the defendant, because he knew at the trial that Anderson's "no prearrangement testimony" was false; and, as the court in another connection said in United States v. Sobell (142 F. Supp. 515, 519, 528, affd. 244 F. 2d 520, cert. den. sub nom. Sobell v. United States, 355 U. S. 873):

> "[W]henever knowledge was in the possession of defense counsel during trial of facts which either established the impropriety of certain evidence, or even cast doubts upon its admissibility, they are barred from raising this question on a motion to vacate judgment [p. 519]. * * * the prosecution cannot suppress evidence or facts if they are known to the defense" [p. 528; emphasis supplied].

A trial should of course be free of over-reaching

on the part of the prosecution and when such conduct has resulted in a conviction it should, without question, be set aside, but the ends of justice are poorly served when a conviction is set aside in a case where the defendant's guilt is clear beyond any reasonable doubt and where the defendant has not been misled or deceived by the perjured testimony and had it in his power to indicate its falsity.

In this case, the court in the coram nobis hearing, who was also the Trial Justice, said:

> "I can say now that testimony of this trial sans the testimony of Anderson was in my opinion sufficient to convince the jury of the guilt of this defendant beyond a reasonable doubt, and I was convinced of his guilt beyond a reasonable doubt or I would not have permitted the verdict to stand."

He also said, "When I received papers from Mr. Washington [apparently the instant coram nobis application] * * * I was convinced, and I'm convinced of this defendant's guilt of this heinous murder"; but he nevertheless granted the defendant's application to set aside the judgment of conviction, because, in his words, "the appellate courts have, it seems to me, created a very narrow area in which a court may rule in this particular type of situation" and "there is no breadth

to the decisions that would permit me to do that [deny the application]. I am still only a Court, and if that's going to be the rule, then it should be made by the Court of Appeals, or by an appellate court, and I can't make it. I would think that this is a type of case that would be justified to have that kind of ruling."

I believe that the learned Justice at the Criminal Term was right in what he believed the rule should be. The proof of the defendant's guilt, in what the Trial Judge himself described as a heinous murder, is undisputed. The facts of the killing were directly testified to by a Mr. and Mrs. Silver, two eyewitnesses, and it seems clear to me that Anderson's testimony played little, if any part, in the defendant's conviction, for the jury was made fully aware of his prior criminal record, of the pending gun charge and of the fact that he had consumed a large guantity of alcohol on the day of the murder.

Under the circumstances I believe that the record establishes that the prosecution's gross impropriety in withholding the disclosure of the promise made to Anderson was harmless beyond a reasonable doubt (cf. Chapman v. California, 386 U. S. 18).

To order a new trial for this guilty defendant is

to exhalt form above substance and to permit a defendant to benefit by his own perjury. Neither society nor a healthy respect for the law is benefitted by such a ruling. The order should be reversed, on the law and the facts, and the application denied.

LATHAM, J., concurs.

MARTUSCELLO, J., concurs in result.

M U N D E R , Acting P.J. (dissenting). This is a very disturbing case. The factual basis for the defendant's coram nobis application is set forth in the majority opinion of Mr. Justice Shapiro. In his oral decision on the coram nobis hearing, Mr. Justice McDonald observed that the trial testimony sans the testimony of Anderson was sufficient to establish the defendant's guilt beyond a reasonable doubt. Being in accord with that view, I would prefer to adopt the conclusion reached in the majority opinion.

However, it seems to me that the majority opinion throws an unfair burden on the defense in requiring it to call the lie on the prosecution's witness who falsely denied that he had been promised some benefit for his testimony. Despite the fact that the defendant now says that Anderson informed

him before the trial "that the district attorney had told him (Anderson) that he would see what he could do to help him on the gun case under indictment #1821/1966, if he would testify against petitioner," and the fact that his trial counsel, who continues to represent him here, concedes that his client had informed him of his conversation with Anderson,* the choice presented to them on the trial before the jury was indeed a Hobson's choice. With the extensive cross-examination by both defense counsel and the trial court failing to crack the witness' absolute statement of not only no promise but no suggestion of help at all, the defendant's testimony of his conversation with the witness would receive little or no credence from the jury when the prosecutor remained mute. Defense counsel in these circumstances might well share the jury's lack of belief in the story.

Mr. Justice Shapiro stresses such knowledge by the defendant as obviating any fraud, which he says is the basis for the rule requiring the prosecutor's disclosure of a promise. He concludes that, because the defendant perjured himself when he testified on the trial that he knew of no reason why Anderson testified as he did against him, he should

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*(although the defendant, in his affidavit in support of his coram nobis petition, says he "never told his trial counsel of Anderson's" statement to him.)

not now be accorded relief. I am not sure that the defendant's testimony was in fact perjurious. In view of Anderson's strong and persistent testimony of no quid pro quo, the defendant might well have concluded that Anderson's jailhouse talk with him was simply imaginative boasting. The defendant did not hear the prosecutor make the promise, as was the case in Green v. United States (256 F. 2d 483), cited in the majority opinion of Mr. Justice Shapiro. Thus the defendant did not know the promise had been made and had no way of knowing whether Anderson's trial testimony was true or false.

Anderson's lie about no promise of help was not fixed until the prosecutor who had made the promise, and who tried the case, later deposed in an affidavit in support of his motion to dismiss the gun possession indictment against Anderson that in fact the promise had been made.

Like Mr. Justice McDonald, I would rather ignore this lapse of the prosecutor in failing to reveal the promise as harmless error, particularly since the trial proof overwhelmingly established the defendant's guilt of a heinous murder. But until the Court of Appeals limits the effect of People v. Savvides (1 N Y 2d 554) I think we are bound to rule that "the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth" and

this despite the nature of the case and the strength of the proof (People v. Savvides, supra, p. 557).

In People v. Adams (21 N Y 2d 397, 402) Judge Scileppi quoted with approval the language of the court in People v. Lombard (4 A D 2d 666, 671) that "'the District Attorney is an advocate, but, at the same time, he is a quasi-judicial official (People v. Fielding, 158 N. Y. 542) and his primary duty is to see that justice is done and the rights of all -- defendants included -- are safeguarded. There is a positive obligation on his part to see that a trial is fairly conducted (Berger v. United States, 295 U. S. 78).'"

Therefore, the order should be affirmed.

BRENNAN, J., concurs in the dissenting opinion by MUNDER, J., Acting P.J.

OPINION OF THE COURT OF APPEALS

JONES, J. We affirm in this case on a very narrow ground.

At the trial of Washington the appellant here, Martin Anderson an important prosecution witness, falsely and insistently testified on cross-examination that he had no reason to expect leniency in return for his willingness to take the witness stand for the prosecution. In fact at least soft promises, and probably more, had been made to him, and after the trial of Washington a related indictment against Anderson was dismissed on recommendation of the prosecutor, who cited Anderson's cooperation at Washington's trial.

The prosecutor, who personally had given the assurances to Anderson, took no steps to tell the jury the truth of the matter. Were there no more, we would reverse and order a new trial. (People v. Savvides, 1 N Y 2d 554; People v. Mangi, 10 N Y 2d 86; Napue v. Illinois, 360 U.S. 264.)

On the present coram nobis application, however, Washington repeatedly asserts that just prior to his trial, he had been informed by Anderson of the promises made to

Anderson by the prosecution. When at his trial Washington took the stand to establish an alibi, the Trial Judge, on his own, examined him closely as to whether he knew any reason why Anderson would have given the testimony against him which Anderson had. Washington was then evasive and failed totally to disclose to the court or to the jury the knowledge he had of the promises which had been made to Anderson.

Further, at the hearing on this application, Washington's present counsel, who had also been his trial counsel, informed the court that the report of Anderson's pretrial disclosure of the promises made to him was not a recent contrivance. With commendable candor counsel told the court that Washington had told him at the time of the trial of the information furnished by Anderson.

We deplore the failure of the prosecutor immediately to correct the entirely false impression left by Anderson's testimony. Where, however, as here, both the defendant and his counsel, with knowledge of the facts, stood silently by and did nothing themselves to remedy the situation, we would make a very limited exception to the Savvides rule. To do otherwise, in our view, would be merely to punish the prosecution, and thus to penalize the People, where

there cannot be said to be legitimate interests of the defendant to be protected.

CHIEF JUDGE FULD (dissenting). The critical fact in this case stands undisputed. An important witness for the prosecution blatantly and persistently lied when, on cross-examination, he testified that he had received no promises of leniency in return for his testimony against the defendant, and the trial prosecutor, knowing full well that the witness was lying, stood silently by without telling the court or jury the truth. Such conduct, in my view, is indefensible and demands that the requested writ of coram nobis be granted and a new trial ordered. (See, e.g., People v. Savvides, 1 N Y 2d 554, 556-557; People v. Mangi, 10 N Y 2d 86, 89; People v. Adams, 21 N Y 2d 397, 402; Napue v. Illinois, 360 U. S. 264, 269-270.)

That the witness apparently told the defendant, prior to the trial, that he had been promised leniency and that he had passed such information on to his lawyer can hardly justify or condone the prosecutor's silence. The defendant and his attorney — in view of the witness' repeated and categorical testimony to the contrary in the very presence of the prosecutor — may well have been led to

believe that he was lying when he informed the defendant that the District Attorney had promised him leniency. In any event, and this is crucial, defense counsel and his client were assuredly entitled to rest upon the certainty that, if the witness was testifying falsely on so vital a matter, the prosecutor himself would speak out and set the record straight.

In People v. Savvides (1 N Y 2d 554, supra), this court unequivocally announced the principle to be applied in situations such as this (pp. 556-557):

> "The adminsitration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. The prosecutor should have corrected the trial testimony given by [the witness] and the impression it created. * * * His failure to do so constitutes 'error so fundamental, so substantial,' that a verdict of guilt will not be permitted to stand. (People v. Creasy, 236 N. Y. 205, 221.)
>
> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. Nor does it avail respondent to contend that defendant's guiltwas clearly established or that disclosure would not have changed the verdict. The argument overlooks the

> variant functions to be performed by jury and reviewing tribunal. 'It is for jurors, not judges of an appellate court such as ours, to decide the issue of guilt.' (People v. Mleezko, 298 N. Y. 153, 163.) * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." (Emphasis supplied.)

What we declared in Savvides should not, in this case, be watered down one drop or changed one tittle. When a prosecutor realizes that his witness is perjuring himself — even if he believes that the defendant also knows that the witness has spoken falsely — he should immediately and forthrightly step forward and expose the lie. A regard for the rigid standards of honesty and fair dealing imposed upon prosecutors requires no less. It is upon their "'conscience and circumspection'" that our criminal justice system depends. (United States v. Dotterweich, 320 U.S. 277, 285.)

The order appealed from should be reversed and a new trial ordered.

JUDGES BURKE, BREITEL, JASEN, GABRIELLI AND [illegible]ER concur with Judge Jones; Chief Judge Fuld dissents and votes to reverse in a separate opinion.

Order affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA
ex rel. LEON WASHINGTON,

Petitioner,

- against -

LEON V. VINCENT, Warden,
Greenhaven State Prison,

Respondent.

----------X

74 Civ.

NOTICE OF PETITION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Leon Washington, the Petitioner herein, dated September 20, 1974, and upon the annexed exhibits and memorandum of law, the undersigned will move this Court, on the 3rd day of January, 1975, for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. §2254 and for such other relief as to this Court may seem just and proper.

Dated: New York, New York
December 4, 1974

Yours, etc.,

Patrick M. Wall
36 West 44th Street
New York, New York 10036
(212) 986-6688

Counsel to Petitioner

TO:

Clerk
United States District Court for the
Eastern District of New York

Hon. Louis J. Lefkowitz
Attorney General, State of New York

Hon. Eugene Gold
District Attorney, Kings County

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA
ex rel. LEON WASHINGTON,

Petitioner,

- against -

LEON V. VINCENT, Warden,
Greenhaven State Prison,

Respondent.

----------X

74 Civ.

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF DUTCHESS)

LEON WASHINGTON, being duly sworn, deposes and says:

1. I am the Petitioner herein, and I make this affidavit, prepared for me by my attorney, Patrick M. Wall, in support of my application for a writ of habeas corpus pursuant to 28 U.S.C. §2254.

2. On or about June 21, 1966, I was indicted for the crime of murder in the first degree in Supreme Court of the State of New York, Kings County. On March 3, 1967, I was found guilty of that crime after a trial before Hon. Myles F. McDonald, Justice of the Supreme Court of the State of New York, Kings County, and a jury. On April 17, 1967, judgment was entered against me, sentencing me to life imprisonment.

3. By an order dated April 14, 1969, the Appellate Division, Second Department, affirmed the judgment. See People v. Washington, 32 App. Div. 2d 613 (2d Dep't 1969). On June 16, 1970, the Court of Appeals of the State of New York affirmed the order of the Appellate Division. See People v. Washington, 27

N.Y. 2d 649 (1970).

4. At my trial, the principal witness against me was one Martin Anderson, who testified to facts from which the jury could have inferred that I had committed the crime charged against me. I believe that had he not testified against me, I would not have been convicted.

5. On or about January 7, 1971, I moved in Supreme Court, Kings County, for an order vacating my judgment of conviction on the ground that, to the knowledge of the Assistant District Attorney of Kings County who had prosecuted the case against me, Martin Anderson had lied when he denied having been promised any consideration on the cases pending against him for his testimony against me. It was established on the hearing held pursuant to my motion that my allegations were true and, on March 23, 1971, Hon. Myles F. McDonald granted my motion, vacated my judgment of conviction, and ordered a new trial.

6. On January 24, 1972, on appeal taken by the prosecutor to the Appellate Division, Second Department, the order vacating the judgment of conviction was reversed, and the judgment was reinstated. Rather than detail here the reasons for the reversal, I have annexed hereto as Exhibit A the opinion of the Appellate Division, Second Department, reversing the order of the court below, together with the dissenting opinion of Mr. Justice Munder and Mr. Justice Brennan. See People v. Washington, 38 App. Div. 2d 189 (2d Dep't 1972).

7. On May 31, 1973, on further appeal to the Court of Appeals of the State of New York, the order of the Appellate Division, Second Department, was affirmed. Rather than detail here the reasons for the affirmance, I have annexed hereto, as Exhibit

B, the opinion of the Court of Appeals affirming the order of the Appellate Division, Second Department, together with the dissenting opinion of Chief Judge Fuld. See People v. Washington, 32 N.Y. 2d 401 (1973).

8. I adopt here, as if more fully set forth at length, the facts as stated in the two opinions constituting Exhibits A and B hereto.

9. I am presently serving a term of life imprisonment in State Prison in New York by virtue of the judgment of conviction entered against me in Supreme Court, Kings County, on April 17, 1967.

10. For the reasons set forth in the annexed memorandum of law, my imprisonment, and the continuation thereof, is in violation of my rights to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

11. I am advised by my counsel that I have exhausted all remedies available to me under the laws of the State of New York.

WHEREFORE, I respectfully request that this Court issue a writ of habeas corpus pursuant to 28 U.S.C. §2254, and order my immediate release from State Prison or, in the alternative, my release unless the District Attorney of Kings County shall have obtained my conviction after a new and prompt trial.

Leon Washington
Leon Washington

Sworn to before me this
20th day of September, 1974.

Notary

FRANCIS E. McDONNELL
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YOPK
----------X

UNITED STATES OF AMERICA
ex rel. LEON WASHINGTON,

Petitioner,

74 Civ.

- against -

LEON V. VINCENT, Warden,
Greenhaven State Prison,

Respondent.

----------X

MEMORANDUM OF LAW IN SUPPORT
OF PETITIONER'S APPLICATION
FOR A WRIT OF HABEAS CORPUS

I INTRODUCTION

Petitioner Leon Washington has applied to this Court for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on the ground that his conviction in the Supreme Court of the State of New York, County of Kings, for the crime of murder in the first degree, was had in violation of his rights under the due process clause of the Fourteenth Amendment.

It is Petitioner's claim that his right to due process was violated when the prosecutor in his case allowed an important witness to perjure himself concerning whether he had received any consideration from that prosecutor for his testimony. The New York appellate courts which have heard this case have held that the fact that Petitioner and his counsel knew of the perjury when it was committed justifies a narrow exception to the rule that a prosecutor's failure to disclose such perjury violates a defendant's due process rights.

Since the majority and minority opinions in both the Appellate Division, Second Department and the New York Court of Appeals set forth the various legal principles involved in this case, there seems no need, at this point, for an extended argument. Nevertheless, for purposes of clarifying what we believe the crucial issues to be, a brief argument is appropriate.

II ARGUMENT

As noted above, the sole reason why the New York court did not grant Petitioner a new trial on the ground of the prosecutor's failure to disclose the perjury of his witness was the fact that both Petitioner and his trial counsel knew that the witness was committing perjury when he denied that he had been promised consideration for his testimony. This "knowledge" was achieved in the following manner: (1) the witness, Martin Anderson, before testifying against Petitioner, told him that he was doing so because the prosecutor had promised to help in a case of his own then pending; and (2) Petitioner told his counsel of this conversation.

A. Petitioner's 'Knowledge" o Anderson's Perjury

On the basis of the fact that Petitioner, having heard from Anderson of the prosecutor's promise, knew that Anderson was committing perjury when he denied receiving any promise, Petitioner was denied relief by the New York courts. That denial, we submit, was based upon erroneous reasoning.

We have no quarrel, of course, with those cases which refuse to permit a defendant, post-trial, to take advantage of trial defects which he knew about at trial and could have set right

at that time. But that is not thise case.

Here, Petitioner heard Anderson deny under oath that the prosecutor had made any promise to him. In light of the prosecutor's failure to correct this testimony, might not Petitioner have concluded that the denial of any promise was truthful and that Anderson had lied to him about the promise in an effort to explain why he was about to testify? Moreover, could Petitioner in any event have set the matter straight? Would any juror believe him if he were to have testified about what Anderson had told him, especially when the prosecutor sat silent when Anderson denied the promise?

We submit that Petitioner's failure to disclose what Anderson had told him may not constitutionally be held against him. His failure to get out of the dilemma he faced may not now be used against him, especially since that dilemma was created by the prosecutor's improper silence.

B. Counsel's "Knowledge" of Anderson's Perjury

The New York courts which refused relief to Petitioner relied in part upon a finding that Petitioner's trial counsel "knew" of Anderson's perjury but that he, too, did nothing about it. That finding is most erroneous. It is based in part upon the assumption that defense lawyers believe everything their clients tell them and do not believe that their clients ever lie to them. This is most assuredly not so, as any trial lawyer of more than a week's practical experience knows.

Having noticed that a prosecutor—with the clear duty to correct any perjury of his witness—sat silently by while Anderson

denied receiving a promise, was not defense counsel entitled to believe that no such promise had ever been made? If so, how can his failure to act be used now against his client?

III CONCLUSION

We submit that, for the foregoing reasons, Petitioner's conviction violated his right to due process of law. The writ of habeas corpus should issue.

Respectfully submitted,

Patrick M. Wall

Patrick M. Wall
36 West 44th Street
New York, New York 10036
(212) 986-6688

Counsel to Petitioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel. LEON WASHINGTON,

Petitioner,

-against-

LEON J. VINCENT, Warden, Green Haven Prison,

Respondent.

AFFIDAVIT IN OPPOSITION

74 Civ. 1722

----------X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BURTON HERMAN, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for respondent. I submit this affidavit in opposition to the petition for issuance of a writ of habeas corpus.

On April 17, 1967 at a term of the Supreme Court, Kings County (McDonald, J.) petitioner was sentenced to life imprisonment after being found guilty of the crime of murder in the first degree by the verdict of a jury. The judgment of conviction was affirmed by the Appellate Division, Second Department, 32 A D 2d 613 and by the New York Court of Appeals, 27 N Y 2d 649. Application for coram nobis was granted, the judgment of conviction was set aside and a new trial was ordered. Order vacating judgment of conviction was reversed, 38 A D 2d 189, and the order of the Appellate Division, Second Department, was affirmed, 32 N Y 2d 401.

Petitioner contends that the principal witness against him lied when he denied having been promised any consideration on the cases pending against him for his testimony against petitioner. However, as the highest state court noted, petitioner and his counsel "with knowledge of the facts, stood silently by and did nothing themselves to remedy the situation." People v. Washington, 32 N Y 2d 401, 403 (1973). Since petitioner and defense counsel knew the ground for impeaching the witness' testimony their failure to do so precludes the granting of habeas corpus relief. United States ex rel. Polhill v. Otis, 316 F. Supp. 334, 336 (S.D.N.Y. 1970); United States ex rel. Fein v. Deegan, 410 F. 2d 13, 23-24 (2d Cir. 1970) (concurring opinion). Moreover, petitioner's knowledge of the facts and the knowledge of his defense counsel establishes that there was no suppression of evidence by the State. Cf. United States v. Ruggiero, 472 F. 2d 599, 604 (2d Cir. 1973); United States ex rel. Dumas v. Patterson, 382 F. Supp. 217 (S.D.N.Y. 1974).

WHEREFORE, the petition should in all respects be denied.

BURTON HERMAN

Sworn to before me this
7th day of January, 1975

Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. LEON WASHINGTON, Petitioner, v. LEON V. VINCENT, WARDEN, GREENHAVEN STATE PRISON, Respondent.	74-C-1722 MEMORANDUM and ORDER

APR 10 1975

Appearances:

Patrick M. Wall, 36 West 44th Street, New York City 10036, for relator

Louis J. Lefkowitz, Attorney General of the State of New York, Two World Trade Center, New York City 10047, Burton Herman, Ass't Attorney General, of counsel, for respondent

COSTANTINO, D.J.

This is a petition for a writ of habeas corpus based upon an allegation that the relator was denied his due process right to a fair trial when the prosecutor at his trial allowed an important witness to perjure himself about whether he had received consideration for testifying for the prosecution. On March 3, 1967 the relator was found guilty by a jury of murder in the first degree in

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Supreme Court, Kings County. On April 14, 1969 the Appellate Division, Second Department, affirmed the judgment, People v. Washington, 32 A.D. 2d 613, 300 N.Y.S.2d 525, and the Court of Appeals affirmed, 27 N.Y.2d 649, 313 N.Y.S.2d 869 (1970). The relator next moved for an order vacating the judgment of conviction, and after a hearing, the motion was granted by Honorable Myles F. McDonald in Supreme Court, Kings County on March 23, 1971. The Appellate Division, Second Department reversed that decision, 38 A.D.2d 189, 328 N.Y.S.2d 317 (1972), Justices Munder and Brennan dissenting, and the Court of Appeals affirmed on May 31, 1973, 32 N.Y.2d 401, 345 N.Y.S.2d 520 (1973), Chief Judge Fuld dissenting. Relator has exhausted state remedies as is required by 28 U.S.C. § 2254.

The issue presented has been fully and adequately argued in the various opinions that this case has engendered. Essentially the question is whether the failure of the prosecutor to correct conceded perjury deprived the relator of a fair trial when both the relator and his counsel knew of the perjury. It is clear beyond any doubt that the actions of the prosecutor were wrong; he had

personal knowledge that the witness had been offered assurances and yet he did nothing to correct the impression given by the witness. Were that the end of this case the court would issue the writ, for a conviction based upon perjurious testimony when the perjury is within the knowledge of the prosecutor should be voided. People v. Savvides, 1 N.Y.2d 553, 154 N.Y.S. 885 (1956); Napue v. Illinois, 360 U.S. 264 (1959). However, as both the Appellate Division opinion of Justice Shapiro and the Court of Appeals opinion of Judge Jones noted, the general rule should be modified where the defendant and his counsel knew of the impropriety and had an opportunity to correct the misinformation. Counsel contends that the responses of the witness to his questions about assurances led him to conclude that the information supplied by the defendant was incorrect. If counsel believed the matter that crucial, as he now asserts it was, he could have requested the prosecutor to clarify the matter.

The rule of Savvides, supra, and Napue, supra should not be abandoned, but this case does not present a constitutional error sufficient to require the issuance of a writ of habeas corpus. United States v. Ruggiero, 472

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U.S. 599 (2d Cir. 1973), cert. denied, 412 U.S. 939 (1973). Buttressing this conclusion is the comment of Justice McDonald, who was both the trial judge and the coram nobis judge, that he was convinced that the evidence at the trial was sufficient to convict the relator, even without the testimony of the particular witness with which we are concerned. Accordingly the petition is denied.

So ordered.

U. S. D. J.

FPI SS—3-17-72—30M—9153

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel. :
LEON WASHINGTON, 74-C-1722
:
Petitioner,
: MEMORANDUM and
v. ORDER
:
LEON V. VINCENT, WARDEN,
GREENHAVEN STATE PRISON, :
Respondent. : APR 28 1975

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COSTANTINO, D.J.

On April 10, 1975 this court denied relator's application for a writ of habeas corpus. He now requests a certificate of probable cause to appeal. 28 U.S.C. § 2253.

In its April 10, 1975 decision this court held that the error committed by the Assistant District Attorney during the relator's state trial while egregious, did not rise to the level of a constitutional violation sufficient to justify granting the writ. For this reason a certificate of probable cause is denied.

So ordered.

U. S. D. J.

FPI—SS—3-17-72—30M—9153

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.
LEON WASHINGTON,

74 Civ. 1722

Petitioner,

- against -

NOTICE OF APPEAL

LEON J. VINCENT, Warden,
Green Haven Prison,

Respondent.

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S I R S :

PLEASE TAKE NOTICE that the above-named petitioner hereby appeals to the United States Court of Appeals for the Second Circuit from an order of this Court (Costantino, J.) entered April 10, 1975, which denied petitioner's application for an order pursuant to 28 U.S.C. §2254, and from each and every part of such order.

Yours, etc.,

Patrick M. Wall
36 West 44th Street
New York, New York 10036
(212) 986-6688

Counsel to Petitioner

TO:

Clerk,
United States District Court for
the Eastern District of New York

Hon. Louis J. Lefkowitz
Attorney General of the State
of New York

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of June, one thousand nine hundred and seventy-five.

United States ex rel. Leon Washington,

Petitioner,

v.

Leon J. Vincent, Warden,
Green Haven Prison,

Respondent.

It is hereby ordered that the motion made herein by counsel for the

appellant ~~appellee~~ ~~petitioner~~ ~~respondent~~

by notice of motion dated May 21, 1975 for a certificate of probable cause

be and it hereby is granted ~~denied~~

GRANTED

IRVING R. KAUFMAN, Chief Judge.

J. JOSEPH SMITH

THOMAS J. MESKILL,

Circuit Judges